Petition

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ALEXANDER L. STEVAS,

81-1468

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

COASTAL PETROLEUM COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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QUESTION PRESENTED

Did the Court of Claims, in holding that privately-owned minerals lying beneath a "navigable water of the United States" may be appropriated, converted and used by the United States without compensation simply by virtue of the Government's "navigation servitude," even where the taking was done solely to save the Government the money it would ordinarily have to pay to purchase such property commercially, contravene the mandate of the Fifth Amendment that "private property [shall not] be taken for public use without just compensation"? Did that holding, originally and again after this Court's ruling in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), was brought to the attention of the Court of Claims on motion for rehearing, fail or refuse to follow the principles of *Kaiser Aetna* which stated that in "taking" cases this Court had always called for "ad hoc, factual inquiries" including the character of the Government's action, the reasons for it, and the consequences thereof?

Coastal Petroleum Company, petitioner, is owned 90% by Coastal Caribbean Oils & Minerals, Ltd., and 10% by United Canso Oil & Gas Ltd. Coastal Petroleum Company has two directors in common with Magellan Petroleum Corporation and one director in common with Canada Southern Petroleum Ltd.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Coastal Petroleum Company, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims that a taking by the United States, of limestone in which petitioner had a property interest, was non-compensable under the Fifth Amendment.

OPINIONS BELOW

The opinion of the Court of Claims is reported at 207 Ct. Cl. 701, 524 F.2d 1206. It is reprinted in Appendix A hereto, p. 1a *infra*. A motion for rehearing by Coastal Petroleum Company was denied by the Court of

Claims by an Order issued on June 13, 1980; that Order is not reported, but is reprinted in Appendix B hereto, p. 11a *infra*.

JURISDICTION

The opinion of the Court of Claims making the original decision in this case (dismissing Count I of the complaint) was entered on October 22, 1975. A timely motion for rehearing of that decision was denied by the Court of Claims on June 13, 1980. The litigation as a whole was terminated by an Order dismissing Count II of the complaint, issued by the Court of Claims on September 22, 1981, and a timely petition for rehearing of that Order was denied on November 6, 1981.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1255(1).

CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment to the Constitution:

> No person shall . . . be deprived of property without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

Petitioner Coastal Petroleum Company was the lessee, under a lease granted by the State of Florida, of the water bottoms of Lake Okeechobee, for the purpose of drilling for and producing therefrom all minerals of every type, including limestone. Beginning in 1965, the United States (through the Corps of Engineers) proceeded to construct a levee on Lake Okeechobee, and did so by ex-

cavating the bottom of the Lake, under and near where the levee was to be built. The bed of Lake Okeechobee contained limestone, which is a material used in the construction of levees, and the limestone excavated by the Corps of Engineers was in fact employed in the construction of the levee on Lake Okeechobee.

In addition to the limestone excavated from under and near the levee, limestone was also mined by the United States elsewhere in Lake Okeechobee, not because it was vital to the levee but simply because the limestone was useful for construction and was conveniently located in the Lake.

If the United States had not used the limestone it happened to find in the bottom of Lake Okeechobee, the Corps of Engineers would have had to go out and purchase, on the open market, levee-bank construction material for the construction of the levee.

Lake Okeechobee is a "navigable water of the United States"; there is a navigable waterway running through it. The levee was authorized, however, as a flood control project.

Petitioner filed suit in the Court of Claims, alleging that in building and maintaining the levee, the United States (1) prevented petitioner from mining limestone under and near the levee, and (2) mined and used limestone from the bed of Lake Okeechobee, all of which limestone belonged to petitioner under its lease. These actions by the United States, petitioner said, amounted to a Fifth Amendment taking of petitioner's property in two ways—both its right to mine, and the limestone itself.

Subsequently petitioner amended its complaint to add a separate count for the taking of limestone from another part of Florida, in the course of building the

Trans-Florida Barge Canal. This was denominated as Count II; the Lake Okeechobee portion of the complaint was denominated as Count I.

The United States moved for summary judgment as to Count I on two grounds, one of which was that any "taking" of petitioner's property was non-compensable by virtue of the navigation servitude enjoyed by the United States. On October 22, 1975, the Court of Claims issued a decision granting the Government's motion for summary judgment as to the Lake Okeechobee claim, solely on the ground of the navigation servitude. This is the decision involved in this petition.

In its decision, the Court of Claims held that although the levee was primarily a flood control project, it also served a navigation purpose and therefore the levee project "is entitled to the benefits of the navigation servitude" (524 F.2d at 1210, p. 7a, *infra*). The Court said that "Congress may, of course, decide in a particular case not to rely on the servitude, but rather to compensate owners of submerged land in navigable waters" but where there is "no ascertainable Congressional intent" to pay compensation

> the presumption is that Congress intended to exercise both its navigation power and the navigation servitude. 524 F.2d at 1210, p. 7a, *infra*.

The Court went on to say that it found nothing to persuade that Congress, despite its power to use the submerged property without compensation, "desired to make payment to the owners." The Court of Claims was thus holding that compensation is not to be paid for such a taking unless there is affirmative evidence that Congress so intended.

As to petitioner's two distinguishable claims—one for deprivation of the right to mine under and near the levee, the other for limestone mined by the Government

elsewhere in the Lake—the Court of Claims held that while the application of the navigation servitude "is less clear as to the limestone mined elsewhere in the Lake," 525 F.2d at 1211, p. 8a, *infra*, yet the taking of that limestone, too, was non-compensable. That limestone, said the Court, was found in the "very same navigable water"; it was used in the levee project; and that use, therefore, "was authorized as part of and directly incident to the main work. No payment had to be made . . . . That the United States might have received some commercial . . . benefit from use of the limestone does not reduce the extent of the navigation servitude." 524 F.2d at 1212, p. 9a, *infra*.

Petitioner had argued to the Court of Claims that summary judgment was entirely inappropriate here, and that the matter should not go off on the papers, but instead there should be a trial to determine the purpose and intent of Congress in authorizing the Lake Okeechobee project, and to adduce evidence on the actions of the Government in mining and using the limestone. The Court nevertheless went ahead on the basis of summary judgment, saying (footnote 7, 524 F.2d at 1212, p. 10a, *infra*):

> Plaintiff has challenged the appropriateness of summary judgment, contending that there should be a trial to ascertain the purposes and scope of the Lake Okeechobee project, as well as of the circumstances surrounding the Government's use of the limestone. We think, however, that there is ample basis for our determination in the affidavit and documents supplied by the parties and in the legal materials relating to the project of which we can properly take judicial notice. Plaintiff does not present enough to raise any factual issue which should be tried.

Following the issuance of the Court's decision on October 22, 1975, petitioner moved for rehearing, ex-

plaining to the Court that the same issue of navigation servitude appeared to be involved in Count II of the complaint, and asking the Court's assistance in holding up any possible finality of the decision for certiorari purposes. The Court of Claims acceded to petitioner's request by issuing an Order on November 26, 1975, treating the motion for "rehearing" as a motion to extend the time for filing a motion for rehearing until 30 days after the disposition of Count II—and as so reframed, the motion was granted. Consequently, the time for moving for rehearing or reconsideration of the decision of October 22, 1975, remained open.

On December 4, 1979, before Count II had been determined, this Court issued its decision in *Kaiser Aetna v. United States,* 444 U.S. 164, a decision which in the opinion of petitioner completely demonstrated that the Court of Claims had been wrong in its decision of October 22, 1975, particularly as to (1) the "presumption" that a taking is always non-compensable unless Congress has manifested an affirmative intention to pay compensation, and (2) the position that such a matter could be determined on summary judgment, without a trial, without developing the evidence as to the purposes of the levee project, the intentions of Congress in authorizing it, or the actions of the Government in appropriating and using the limestone. *Kaiser Aetna* said, 444 U.S. at 175, that compensability and the "taking" question had always been examined by this Court—

> by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental actions—that have particular significance.

Accordingly, petitioner on March 4, 1980, filed a Motion for Rehearing or Reconsideration of the decision on Count I. On June 13, 1980, the Court of Claims issued an Order, reprinted as Appendix B *infra* (p. 11a), denying petitioner's motion. The reason for the denial was that, as stated by the Court of Claims, "we do not view the *Kaiser Aetna* decision as affecting our earlier ruling of October 22, 1975" (p. 12a). The sole ground for this opinion of the Court of Claims was that it believed the *Kaiser Aetna* decision involved only "fast lands" (or analogous property) and did not pertain at all to submerged land or property rights in submerged land. Since the instant case involves only minerals in submerged lands beneath navigable waters, the Court of Claims said, *Kaiser Aetna* was not relevant.

The Court of Claims thus did not view *Kaiser Aetna* as a case of general significance in the "taking" field; it did not regard *Kaiser Aetna* as an across-the-board pronouncement of this Court; it did not consider *Kaiser Aetna* a landmark decision. The Court of Claims felt free to disregard *Kaiser Aetna* on the ground that it was limited to "fast lands" (and even there, it is clear, the Court did not consider *Kaiser Aetna* to be particularly important).

The Court of Claims did not discuss, in its Order of June 13, 1980, the appropriateness of summary judgment procedure in the light of the "ad hoc, factual inquiries" which this Court in *Kaiser Aetna*, 444 U.S. at 175, described as the method for examining the compensability question in a "taking" case.

A petition for certiorari, primarily challenging the Order of June 13, 1980, which denied rehearing, was filed by Coastal Petroleum Company on September 10, 1980, No. 80-389. The petition was denied on December 1, 1980. The case continued in the Court of Claims

on the issue of Count II of the complaint, which involved a separate and different transaction.

Subsequently, on September 22, 1981, the Court of Claims in an unreported Order dismissed Count II of the complaint on the ground that the statute of limitations barred that claim. A timely petition for rehearing was filed by petitioner and was denied on November 6, 1981, thus terminating the action as a whole.

REASONS FOR GRANTING THE WRIT

The Court of Claims is the only court in this country in which a claim for money damages in excess of $10,000 in amount, for a "taking" by the United States, may be brought. *See* the Tucker Act, 28 U.S.C. 1491, 28 U.S.C. 1346(a)(2) (District Courts have concurrent jurisdiction only up to $10,000). That Court is thus, as it has been termed in the title of an article, "A Unique National Court." *See* 53 A.B.A.J. 1025 (1967). The jurisdiction of that Court for claims of over $10,000 is exclusive, it is original, and, except for review by this Court, it is final.

If the Court of Claims has mistaken the impact of a decision of this Court on the "taking" issue, or has in effect refused to follow a decision of this Court on that issue, it is a matter that cannot be corrected by any other court, for petitioner or for the many litigants who will follow us. Only this Court can remedy such a situation.

The importance of the issue is shown by two factors:

(1) A "taking" is a Constitutional matter. The Fifth Amendment provides that private property shall not "be taken for public use without just compensation."

(2) The magnitude of the claims involved here is huge. We are speaking of claims in the many millions of dollars. Those claims are doomed by an erroneous interpretation,

by the Court of Claims, of the Constitutional requirements laid down by this Court.

That is the situation presented in this case. The Court of Claims first erred, in its decision of October 22, 1975, by holding that a "taking" of private property in navigable waters is (by presumption) always non-compensable unless there is an affirmative manifestation of Congressional intent to pay compensation; that Court then compounded its error when it failed to follow, or refused to follow, the dictates of this Court's towering decision in *Kaiser Aetna v. United States*, 444 U.S. 164, handed down on December 4, 1979. In *Kaiser Aetna*, this Court stripped the words "navigation servitude" and "navigable water of the United States" of the mystical quality, the aura of absolutism, that had been imparted to them by the Government—and by many lower federal courts—in recent years. The Court of Claims, however, interpreted the *Kaiser Aetna* decision and the decisions upon which it relies as limited to "fast lands" (or analogous property) and as entirely inapplicable to property rights in submerged lands beneath navigable waters. It therefore refused to apply the principles of *Kaier Aetna* to the present case.

In its Order of June 13, 1980, denying petitioner's motion for rehearing or reconsideration based on the impact of *Kaiser Aetna*, the Court of Claims said that the *Kaiser Aetna* decision "discussed prior cases involving 'fast lands,' and analogized the interest of Kaiser Aetna *et al.* in the developed Pond 'to that of owners of fast land adjacent to navigable waters'." The Court of Claims then said of *Kaiser Aetna*:

> But the Court did not reconsider, change, or modify the pre-existing law as to submerged land beneath concededly navigable waters or the use of such submerged land in connection with an exercise of

the navigation servitude. (*See* Appendix, p. 12a, *infra.*)

Implementing this, the Court of Claims said (p. 13a, *infra*):

> Our decision of October 22, 1975, *infra,* dealt only with minerals in submerged lands beneath navigable waters, waters which were plainly subject to the navigation servitude; the minerals involved were used for a levee project which was itself covered by that servitude, or the minerals could not be used by plaintiff without interfering with the project.

Accordingly, the Court of Claims swept all petitioner's claims, even the claim for the Government's mining of limestone in portions of Lake Okeechobee elsewhere than in the area of the levee,[1] into the non-compensable category. That Court, then adhered to the "presumption" it laid down in its decision of October 22, 1975, that there is to be no compensation for the taking of submerged property rights unless Congress has affirmatively manifested an intention that compensation should be paid. 524 F.2d at 1210, p. 7a, *infra.*

That "presumption," which is destroyed by the *Kaiser Aetna* formula of ad hoc inquiry into the nature of the "taking" transaction, *see* 444 U.S. at 175, and which had no adequate support in prior decisions of this Court, becomes the more ludicrous when applied to the limestone quarried by the Government elsewhere than in the area of the levee. Under no circumstances could Congress have foreseen that the Corps of Engineers

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[1]The Court of Claims, in its decision of October 22, 1975, had expressly said: ". . . we have considered the case on the assumption that limestone was quarried from the middle of the lake, outside of the immediate construction area." Footnote 6, 524 F.2d at 1211; p. 8a, *infra.*

would find a large body of limestone in the bed of Lake Okeechobee, and would appropriate that limestone. It cannot be "presumed" that Congress would have desired to deprive the owner of the purchase price of that limestone, since the normal, the routine, expectation of the Congress is that the Government will have to purchase its construction materials on the open market.

But the Court of Claims said that the principles of *Kaiser Aetna* applied only to "fast lands or analogous property," not to property rights in submerged lands. As to submerged lands, the Court of Claims said, it is sufficient that (1) the levee was a navigation project for Lake Okeechobee, (2) the limestone was all located in Lake Okeechobee, and (3) the limestone was used for the levee. In short, the magic words "navigation servitude" were used by the Court of Claims to override all private rights in submerged lands and the minerals lying thereunder.

This is exactly what *Kaiser Aetna* has knocked out – the idea that *anything* done by the Government within "navigable waters" may be done without compensation, if it somehow relates to the navigation project. *Kaiser Aetna* called for "ad hoc, factual inquiries" as to the character of the Government's action, the reasons for it, the "interference with reasonable investment backed expectations," etc. 444 U.S. at 175. *This was not said with reference to "fast lands"*; it precedes any reference to "fast lands" in the *Kaiser Aetna* opinion. It was said in the course of a general examination of the "navigation servitude." This Court there pointed out that the Court has generally been

> "unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the Government, rather than

> remain disproportionately concentrated on a few persons."

Ibid., quoting from *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

The *Kaiser Aetna* decision had earlier said, 444 U.S. at 170, that the position of the Court of Appeals in that case "presumes that the concept of 'navigable waters of the United States' has a fixed meaning that remains unchanged in whatever context it is being applied." Refuting that thesis, which accords with the Procrustean position of the Court of Claims here as to a "presumption" concerning rights in submerged lands, this Court said that the law on this matter "cannot simply be lumped into one basket." There must be a "careful appraisal of the purpose for which the concept of 'navigability' was invoked in a particular case. *Ibid.* This Court "has never held," said the *Kaiser Aetna* opinion, "that the navigational servitude creates a blanket exception to the Takings Clause whenever Congress exercises its Commerce Clause authority to promote navigation." 444 U.S. at 172.

It was following these statements of general applicability, and preceding any mention of "fast lands," that this Court said that in prior cases it has examined the "taking" question "by engaging in essentially ad hoc, factual inquiries" that have identified factors of significance in each particular case.

Subsequently, the Court said, as the Court of Claims noted in its Order of June 13, 1980, p. 13a, *infra*, that the title of an owner in certain submerged lands is "not as full and complete as his title to fast land which has no connection with the navigation of such waters." 444 U.S. at 176. That may be, but in no way does this say that there is a blanket exception for submerged lands,

or imply that the "ad hoc, factual inquiries" into the Governmental action should not be made. In the instant case, for example, there is an obvious difference between the limestone under and near the levee, necessary to the underbearing of the levee, and the limestone taken from elsewhere in the Lake. Possibly different treatment would result, depending on the result of the inquiries.

Kaiser Aetna v. United States did not, of course, lay down the appropriate principles of law for the first time (nor did it purport to do so), nor were the arguments and decisions collected in *Kaiser Aetna* new to the present case; virtually all of them had been presented by petitioner to the Court of Claims in this case. We refrain from repeating them here. But the Court of Claims, in our view, confused the right of Congress to appropriate private property with the question whether that appropriation constituted a Fifth Amendment "taking," employing the simplistic rubric of "navigation servitude." The Court of Claims apparently believed it did possess the "set formula" (its presumption of non-compensability) which *Kaiser Aetna, Penn Central,* and a host of prior cases had been unable to discern.

It was thus wrong for the Court of Claims, acting on a motion for summary judgment, without a trial, without a hearing of any kind, without an examination of the factors identified by this Court in *Kaiser Aetna* and the cases on which it relies, to hold that all the

actions of the Government here were non-compensable by virtue of the "navigation servitude." The Court of Claims has committed error which is magnified by the near-final jurisdiction of that Court, error which directly contravenes the clear mandate of this Court. That error should be corrected now.

Respectfully submitted,

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Appendix

APPENDIX A

In the United States Court of Claims

No. 309–72

(Decided October 22, 1975)

COASTAL PETROLEUM COMPANY v. THE UNITED STATES

Irving R. M. Panzer, attorney of record, and *E. Michael Paturis*, for plaintiff. *C. Dean Reasoner* and *Reasoner, Davis & Vinson*, of counsel.

Irwin L. Schroeder, with whom was *Assistant Attorney General Wallace H. Johnson*, for defendant.

Before COWEN, *Chief Judge*, DAVIS and NICHOLS, *Judges*.

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

DAVIS, *Judge*, delivered the opinion of the court:

This is a tussle over some limestone at the bottom of Lake Okeechobee in Florida. Plaintiff Coastal Petroleum Company, claiming a compensable interest in the limestone through a lease from an organ of the State of Florida, says that the United States took the mineral without paying for it. The defendant, for its part, asserts, first, that plaintiff has no such compensable interest, and, second, that in any event the Federal Government had the right to use the limestone under its navigation servitude which it exercised in the Lake Okeechobee project. Defendant has moved for summary judgment on this portion of the petition.[1]

[1] Count II of the petition asserts a separate claim under another lease for the taking of limestone in another part of Florida, in the course of the building of the Trans-Florida Canal. That count is not now before us.

For the purposes of this motion, plaintiff is conceded to be the lessee of a valid mineral-drilling lease, granted by the Trustees of the Internal Improvement Fund of the State of Florida, originally let in 1944, modified in 1947 and renewable for five-year terms.[2] This document, Drilling Lease No. 248, grants plaintiff "[a]ll those water bottoms lying within the boundaries of Lake Okeechobee * * * for the purpose of drilling for and producing therefrom oil, gas, sulphur, casinghead gas and casinghead gasoline * * *." Florida has held this lease to cover all minerals.[3]

In 1965, the United States acquired from the Central and Southern Florida Flood Control District two easements covering at least part of the same land covered by the Coastal lease, for the purpose of "construction, maintenance and operation" of the levees on Lake Okeechobee authorized by the Act of June 30, 1948, ch. 771, § 203, 62 Stat. 1176.[4] The easements granted the United States by the Flood Control District had previously been conveyed to the District by Coastal's lessor, the Florida Internal Improvement Fund, in order to pass them on to the United States. The easements specifically allowed the United States to "dig, excavate or otherwise construct artificial channels or waterways" and to "erect or construct levees and/or dikes." [5]

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[2] There is now pending in the Fifth Circuit a case challenging on state grounds the existence and validity (after 1964) of plaintiff's leases from the Internal Improvement Fund. The Fifth Circuit has referred the issue to the Supreme Court of Florida. *See infra*. The United States reserves the right to attack the lease on that state ground if its present motion is denied.

[3] In a 1960 decision as to which certiorari was discharged by the Florida Supreme Court, 125 So. 2d 300, the District Court of Appeals of Florida for the First District determined that the lease included drilling rights for all minerals defined in the broadest sense. *Collins* v. *Coastal Petroleum Co.*, 118 So. 2d 796, 803 (Fla. Dist. Ct. App. 1960). As a decision on the point by an intermediate state court, which the highest court refused to review, this ruling is binding on us. *Stoner* v. *New York Life Ins. Co.*, 311 U.S. 464, 467 (1940), and we assume that Coastal's drilling rights included the right to mine limestone.

[4] The authorizing statute is short and does not contain a description of the project. However, it incorporates by reference the *Comprehensive Report on Central and Southern Florida for Flood Control and Other Purposes, H.R. Doc. No.* 643, 80th Cong., 2d Sess. (1948), which described the program in some detail, and includes plans for "a low levee * * * around the lake shore from the St. Lucie Canal northward to tie in with the present north shore levee." *Ibid.* at 40. The construction of that levee precipitated this suit.

[5] The easement provided that the Government did not acquire any right or interest "in and to any such spoil and spoil materials as may be excavated, dredged or otherwise removed from the hereinafter described lands, except

In the middle or late 1960's, the Corps of Engineers commenced construction of the levee on Lake Okeechobee. It was built "by digging a borrow pit and placing the excavated material on the lake side of the borrow pit." Affidavit of C. W. Pritchett, dated April 14, 1975. In 1968 Coastal filed a suit in the U.S. District Court for the Southern District of Florida in which the company attempted to obtain a mandatory injunction requiring the Corps to issue Coastal a permit to mine limestone in the lake. The permit had been denied because state and local authorities, who were joined as defendants, refused to support the application, largely for environmental reasons. Coastal asked in the alternative for a decree on behalf of either the federal or state defendants condemning its property in either the lease or the minerals and granting compensation. In addition, Coastal asked compensation, against any defendant, for a taking of limestone mined by the Corps and used for the levee. The District Court refused on public policy grounds to grant the injunction, but found that the refusal to grant a permit had worked a taking by the state agencies and that Coastal was entitled to lost profits. *Coastal Petroleum Co.* v. *Secretary of the Army*, 315 F. Supp. 845, 850 (S.D. Fla. 1970). The court did not decide whether there had also been a taking by the federal defendants, because the issue was at that time before the Fifth Circuit in another case. In July, 1970, the Fifth Circuit decided in *Zabel* v. *Tabb*, 430 F. 2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971), that a refusal by the Corps of Engineers to grant a permit (there, to fill a bay) because the project would have adverse environmental, rather than navigation, effects, was a proper exercise of federal power under the Commerce Clause and, additionally, because of the navigation servitude, did not work a taking of any property rights of the owners of the bed of the bay and land riparian to it. *Ibid.* at 214, 215.

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for such excavated materials required for the Project Works hereinabove referred to * * *." The reason for this provision is unclear (it may have been designed to keep the United States from having to dispose of the spoil material), and the parties have not provided us with any information on the intent of either the Government or the Flood Control District. Both parties seem to agree, though, that the limestone is not "spoil" or "spoil material." In that event, the easement says nothing about title to it, although the existence of the proviso suggests that the United States was granted some rights to use materials found in the easement area.

Reacting to *Zabel*, the District Court on October 6, 1970, reversed its earlier decision on the taking issue, and declared that "the federal defendants had the right to deny plaintiff's application to mine in the 5.7 acres applied for, and therefore there was no taking of plaintiff's property in the 5.7 acres." Order, Nos. 68-951-Civ-CA and 69-699-Civ-CA (S.D. Fla. Oct. 6, 1970). The court asked for further briefs on whether the federal defendants should be dismissed or the case transferred to the to the Court of Claims, evidently on the view that the District Court did not have jurisdiction to declare an inverse condemnation of plaintiff's property if the amount exceeded $10,000. *See* 28 U.S.C. §1346 (a)(2). In a memorandum decision and order dated February 5, 1971, the District Court dismissed the suit as against the federal defendants, and found that, as a matter of state law, Coastal had acquired by its lease no compensable property right to the minerals in Lake Okeechobee prior to the time they were mined, and that therefore the state defendants were not liable to Coastal for any taking by virtue of their having granted the United States the easement to build the levee. Coastal did not appeal either the decision dismissing as against the federal defendants or the determination that its ownership rights under the leases were limited to minerals already mined. The state defendants appealed the court's separate holding that Coastal's lease was currently valid under Florida law.

Following the District Court decision, however, Coastal filed suit in this court alleging that in building and maintaining the levee, the United States (1) prevented Coastal from mining limestone under and near the levee and (2) mined and used limestone from the bed of Lake Okeechobee, which limestone belonged to Coastal, all of which amounted to a Fifth Amendment taking of plaintiff's property—both the right to mine and the minerals themselves. Because the Fifth Circuit, as a result of the appeal by the state defendants in the District Court case, has before it the issue of the validity of Coastal's leases from 1964 to the present (including the period during which the levee was built), proceedings in this case were stayed awaiting decision on that issue. The Fifth Circuit has certified the question to the Florida

Supreme Court, which appears unlikely to respond in the near future.

Defendant now contends, in its motion for summary judgment, that the case can be disposed of in its favor, without considering the validity of the lease under state law, on either of two grounds—that Coastal is collaterally estopped from asserting its ownership of unmined minerals by the unappealed decision in the District Court case or that any "taking" is non-compensable by reason of the navigation servitude. Coastal replies that, since the federal defendants were dismissed from the District Court suit for lack of jurisdiction, the doctrine of mutuality prevents the Government from now relying on the decision with respect to the scope of the lease in favor of the state defendants in that case. Coastal also says that the Lake Okeechobee project was a flood control project, rather than an action in aid of navigation, that Congress recognized this, and that therefore the navigation servitude does not apply.

We need not now consider whether plaintiff is collaterally estopped by the District Court's ruling that under Florida law the lease gives it no compensable interest in the limestone in place because we are satisfied that, in any event, the United States can use that limestone, as it has, as part of the exercise of its navigation servitude.

The latter privilege reserves to the Federal Government a dominant interest in all submerged property within navigable waters, up to the low mean high water mark. *United States* v. *Chicago, M., St. P. & P. R.R.*, 312 U.S. 592, 596–97 (1941). This navigation servitude is an extremely old concept—owners of property or property rights within navigable waters take those rights fully cognizant of their limited nature. *United States* v. *Kansas City Life Ins. Co.*, 339 U.S. 799, 808 (1950); *Gibson* v. *United States*, 166 U.S. 269 (1897). Plaintiff has admitted in answer to defendant's interrogatories that all the minerals about which it complains (in this part of its petition) were located below mean high water. Answers of Coastal Petroleum Co. to Interrogatories of Defendant ¶10. Coastal attempts, however, to take the case outside the navigation servitude by pointing out, as one of its points, that the limestone may not all have been

taken "from the navigable waterway of the United States that runs through Lake Okeechobee." *Ibid.* The short answer to this contention is that "[t]he navigation easement is not limited to the thread of the stream where vessels pass, but extends from ordinary high water on one side to ordinary high water on the other." *Allen Gun Club* v. *United States*, 180 Ct. Cl. 423, 429 (1967). Where applicable, the servitude covers the whole of the water found to be navigable, not merely the channel actually used.

The main argument for plaintiff is that the right of the United States to take or use such submerged property is limited to actions in aid of navigation, but that theswork here was for flood control, rather than to aid navigation. The categories are not so distinct. In *Allen Gun Club* v. *United States*, *supra*, we held that flood control projects on the Mississippi and its source streams were also, because of the disastrous effects flooding has on navigation, projects in aid of navigation and that the navigation servitude therefore applied. 180 Ct. Cl. at 429–30; *see United States* v. *Twin City Power Co.*, 350 U.S. 222, 223–24 (1956); *United States* v. *Grand River Dam Authority*, 363 U.S. 229, 231–33 (1960); *United States* v. *Commodore Park, Inc.*, 324 U.S. 386, 391–93 (1945); *cf. Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U.S. 508, 525–26 (1941). The statute under which many flood control undertakings, including the Central and Southern Florida Flood Control Project, are auized states that the projects are "for the benefit of navigation and the control of destructive floodwaters and other purposes." Act of June 30, 1948, ch. 771, § 203, 62 Stat. 1175. Such a declaration has consistently been held conclusive to determine the navigation purpose of a project. *United States* v. *Grand River Dam Authority*, *supra* at 232, and cases cited therein; *United States* v. *Twin City Power Co.*, *supra* at 224, and cases cited. Furthermore, the particular action which forms the basis of this suit, the construction of the Lake Okeechobee levee, was included in the project in large part because of the benefits it would provide for navigation on the Intracoastal Waterway, and this was one of the few parts of the project over which the Federal Government retained control after construction. H.R. Doc. No. 643, 80th Cong.,

2d Sess. 8, 36–37, 41, 49, 53 (1949). We hold, therefore, that the project involved here is entitled to the benefits of the navigation servitude.

Congress may, of course, decide in a particular case not to rely on the servitude, but rather to compensate owners of submerged land in navigable waters for actions which, like those to which the servitude is applicable, are grounded in the power of the Federal Government to regulate commerce. *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 739 (1950); *F.P.C.* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 254–56 (1954). But where a project has a legitimate navigation purpose, and there is no ascertainable Congressional intent to pay compensation, the presumption is that Congress intended to exercise both its navigation power and the navigation servitude. *United States* v. *Twin City Power Co.*, *supra*, 350 U.S. at 225; *United States* v. *Kansas City Life Ins. Co.*, *supra*, 339 U.S. at 808 (decided the same day as *Gerlach*); *United States* v. *Rands*, 389 U.S. 121, 122–24 (1967). That presumption is strengthened here by the proviso in the statute authorizing the project that "nothing herein shall impair or abridge the powers now existing in the Department of War with respect to navigable streams * * *" Act of June 22, 1936, ch. 688, § 3, 49 Stat. 1571; *see* Act of June 30, 1948, ch. 771, § 201, 62 Stat. 1175. We find nothing to persuade that Congress, despite its traditional right to use the submerged property without compensation, desired to make payment to the owners.

To say the navigation servitude applies to the Lake Okeechobee project needs, however, to be further refined. Coastal makes two distinguishable claims—one relating to its inability to mine under and near the levee and the other concerning the use of limestone mined by the United States in building the levee. Once we have determined that the navigation servitude applies to this project, it is obvious that Coastal need not be compensated for loss of its right to take the stone under and near the levee. Such mining would in all probability have destroyed the levee either directly or by weakening the subsurface structure. Since any right to mine was subservient to the use of the property by the Federal Government in aid of navigation, the Corps of Engineers

could, without compensation, preempt use of the lake bottom to support the levee rather than allow it to be used for mining.

While the application of the navigation servitude to limestone mined by the Government elsewhere than in the borrow pit for use in the levee is less clear,[6] we believe that the principle of *United States* v. *Commodore Park, Inc.*, 324 U.S. 386 (1945), requires a decision for defendant. In that case, the United States, to provide better landing facilities for sea planes based at the Hampton Roads Naval Operating Base, dredged Willoughby Bay, a navigable waterway, to a depth of 10 to 15 feet below mean low water. The dredged material was used to enlarge the shore facilities of the Base by placement at the mouth of Mason Creek, thereby destroying the navigability of that water. *Ibid.* at 389. Commodore Park owned fastlands on Mason Creek, and sued for a taking of that part of the value of its land which was based on its fronting on a navigable waterway. *Ibid.* at 387–88. The District Court found that neither the dredging nor the filling of Mason Creek had any relation to navigation, and granted compensation. The Fourth Circuit Court of Appeals affirmed, holding that while the dredging was related to navigation, the fill, which had caused the damage, was not. *Ibid.* at 388, 391. The Supreme Court reversed on two main grounds.

First, the Court found that there was no property interest owned by Commodore Park in the flow of Mason Creek, a finding which is irrelevant to this case as we now decide it.

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[6] Defendant's position is murky as to whether limestone from outside the borrow pit was used in constructing the levee. In its answer to Coastal's petition, defendant appeared to admit that substantial quantities of limestone from the lake bed were used in the construction. Answer ¶9; *see* Answer to First Amended Petition ¶9. On the other hand, in its latest submission, the affidavit of Construction Branch Chief C. W. Pritchett, defendant seems to imply that the only limestone taken from the lake bed was taken when the borrow pit, because of the irregularity of the lake shore, entered the lake. Affidavit of C. W. Pritchett ¶¶4, 5; Note 1 to Map entitled Levee 47–Section 1, Plan and Sections, submitted with affidavit. If this later explanation is correct, the servitude would clearly bar recovery since the borrow pit was an integral part of the levee and water control system. However, given the requirement that we view the facts most favorably to plaintiff on defendant's motion for summary judgment, *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962), and the uncertainty of defendant's response, we have considered the case on the assumption that limestone was quarried from the middle of the lake, outside of the immediate construction area.

The Court then went on to find that the filling of Mason Creek was covered by the navigation servitude even though it impeded, rather than aided, navigation, and even though the project was on a distinct, though connected, body of water from the Bay where dredging in aid of navigation occurred. *Ibid.* at 392-93. It was the total project, not individual pieces of it which Congress, through the War Department, had determined to be in aid of navigation—and that judgment, invoking the navigation servitude, was not to be disturbed. *Ibid.* at 392.

We think the same reasoning is applicable here. The Lake Okeechobee project must be considered as authorized as a whole, for construction as found proper by the Corps of Engineers. When the Corps decided (if it did, *see* note 6 *supra*) to use limestone found below mean high water within the navigable waters in order to build the levee, there was "not an invasion of any private property right in such lands for which the United States must make compensation. The damage sustained resulted not from a taking of the * * * owner's property in the stream bed, but from the lawful exercise of a power to which that property has always been subject." *United States* v. *Chicago, M., St. P. & P. R.R.*, *supra*, 312 U.S. at 597. So long as the limestone was employed for the levee project—which was itself plainly covered by the navigation servitude—that use of submerged minerals below the high water mark of the very same navigable water was authorized as part of and directly incident to the main work. No payment had to be made. "[T]he Congress, and those to whom it has delegated authority, may, without Fifth Amendment liability, employ land submerged under navigable water in the way that in their best judgment helps to accomplish the overall purpose even if, intentionally or not, they impair navigation for some purposes in some areas." *Allen Gun Club* v. *United States*, *supra*, 180 Ct. Cl. at 430. That the United States might have received some commercial, rather than military (as in *Commodore Park*, *supra*), benefit from use of the limestone does not reduce the extent of the dominant interest. *See United States* v. *Rands*, *supra*; *United States* v. *Twin City Power Co.*, *supra*.

The defendant's motion for summary judgment is granted [7] and Count I of the petition is dismissed. The case is remanded to the trial division for appropriate proceedings on Count II.

[7] Plaintiff has challenged the appropriateness of summary judgment, contending that there should be a trial to ascertain the purposes and scope of the Lake Okeechobee project, as well as of the circumstances surrounding the Government's use of the limestone. We think, however, that there is ample basis for our determination in the affidavit and documents supplied by the parties and in the legal materials relating to the project of which we can properly take judicial notice. Plaintiff does not present enough to raise any factual issue which should be tried.

APPENDIX B

IN THE
UNITED STATES COURT OF CLAIMS

No. 309-72

[Filed: June 13, 1980]

COASTAL PETROLEUM COMPANY

v.

THE UNITED STATES

Rehearing denied of decision of October 22, 1975, 207 Ct. Cl. 701, 524 F.2d 1206; inapplicability of Supreme Court decision in *Kaiser Aetna v. United States*, Dec. 4, 1979.

Carroll J. Reasoner, attorney of record, for plaintiff. *C. Dean Reasoner* and *Irving R. M. Panzer*, of counsel.

John E. Lindskold, with whom was *Assistant Attorney General James W. Moorman*, for defendant.

Before DAVIS, *Judge*, Presiding, COWEN, *Senior Judge*, and NICHOLS, *Judges*.

ORDER

Plaintiff moves the court for rehearing or reconsideration of its decision in this case of October 22, 1975, 207 Ct. Cl. 701, 524 F.2d 1206, on the ground that the decision of the Supreme Court in *Kaiser Aetna v. United States*, U.S. Sup. Ct. No. 78-738, decided December 4, 1979, 48 U.S.L.W. 4045, "has completely undermined the basis for this Court's ruling, which was directed to Count I of the petition."[1]

We deny the motion for rehearing or reconsideration because we do not view the *Kaiser Aetna* decision as affecting our earlier ruling of October 22, 1975. The Supreme Court's case involved Kuapa Pond, a shallow privately-owned lagoon separated by a barrier from navigable waters, which was later developed by the owners and made accessible to navigable water by a lawful, man-made breach in the barrier. In holding that the Federal Government could not open the Pond to the public (after it had been made freely accessible by Kaiser Aetna et al. to navigable waters) without paying just compensation, the Supreme Court discussed prior cases involving "fast lands", and analogized the interest of Kaiser Aetna et al. in the developed Pond "to that of owners of fast land adjacent to navigable water." But the Court did not reconsider, change, or modify the pre-existing law as to submerged land beneath concededly navigable waters or the use of such submerged land in connection with an exercise of the navigation servitude. Indeed, the Court quoted, at length

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[1] Plaintiff's motion is timely under Rule 151 because, by order of November 26, 1975, the court extended plaintiff's time for filing a petition for rehearing "until thirty (30) days after the court finally disposes of Count II of the petition." Count II has not yet been disposed of.

and without any sign of disapproval, from *Scranton v. Wheeler*, 179 U.S. 141, 163 (1900), that "Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a mere technical title, not at his disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation."

Our decision of October 22, 1975, *supra*, dealt only with minerals in submerged lands beneath navigable waters, waters which were plainly subject to the navigation servitude;[2] the minerals involved were used for a levee project which was itself covered by that servitude, or the minerals could not be used by plaintiff without interfering with the project. In holding that plaintiff was not entitled to compensation for the minerals, we relied on decisions of the Supreme Court and of this court laying down the same principle as stated in the quotation from *Scranton v. Wheeler* which the Supreme Court included in its *Kaiser Aetna* opinion.

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[2]We said in our decision (207 Ct. Cl. at 708, 524 F.2d at 1209) that "Plaintiff has admitted in answer to defendant's interrogatories that all the minerals about which it complains (in this part of its petition) were located beneath ordinary high water." There may be some attempt in the present motion for rehearing or reconsideration to retreat from that position, but if so that change comes too late.

Accordingly, the motion for rehearing or reconsideration of the court's decision on Count I is denied.

BY THE COURT

/s/ Oscar H. Davis
Judge, Presiding

Appendix

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ALEXANDER L. STEVA
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No. 81-1468

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

COASTAL PETROLEUM COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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APPENDIX C

UNITED STATES COURT OF CLAIMS

No. 309-72

[Filed: Sep. 22, 1981]

COASTAL PETROLEUM COMPANY

v.

THE UNITED STATES

Government taking without compensation; statute of limitations; accrual of claim.

Irving R. M. Panzer, attorney of record, for plaintiff. *Carroll J. Reasoner* and *C. Dean Reasoner,* of counsel.

Pauline H. Milius, with whom was *Acting Assistant Attorney General Carol E. Dinkins,* for defendant.

Before NICHOLS, KUNZIG and BENNETT, *Judges.*

ORDER

The last aspect of this protracted public taking case comes before this court on defendant's motion for summary judgment on Count II of plaintiff's petition.[1] The decisive issue is whether plaintiff's claim is time-barred. We hold that plaintiff's cause of action accrued more than six years before the present claim was filed, and consequently grant defendant's motion.

[1] The first count was dismissed in 1975 on defendant's motion for summary judgment. *Coastal Petroleum Co. v. United States,* 207 Ct. Cl. 701, 524 F.2d 1206 (1975).

Plaintiff, Coastal Petroleum Company, filed its original claim against the government in 1972, alleging a taking for the public use without just compensation. The taking, plaintiff claimed, occurred when the government built a levee across certain Florida lands around Lake Okeechobee, using in the construction commercial grade limestone to which plaintiff had leased the mineral rights, and preventing plaintiff access to other limestone deposits in the surrounding lands. This claim was disposed of by this court in 1975 on summary judgment for the defendant.

Plaintiff amended its original complaint in 1974 to include a cause of action arising out of the government's construction of the Cross Florida Barge Canal, completed seven years previously in 1967. Plaintiff again contends that the government used commercial grade limestone from lands in Citrus County, Florida, in which plaintiff held the mineral rights. It also alleges that the Cross Florida Barge Canal prevents access by plaintiff to other limestone deposits in the lands surrounding the canal. Plaintiff therefore claims compensation for the alleged taking of its property by the government.

Defendant argues in its motion for summary judgment on the ammended complaint that plaintiff's claim, if any, accrued no later than at the time the Barge Canal was completed in 1967 and thus is barred by the applicable statute of limitations. Plaintiff alleges that it was unaware of its potential cause of action arising from the construction of the Barge Canal until "July or August of 1974" and thus it has timely filed its petition with this court.

This court has jurisdiction to hear a claim against the United States that is filed within six years after the cause of action accrues. 28 U.S.C. § 2501. Generally, a claim

first accrues, and the statute of limitations begins to run, when all the events have occurred which fix the alleged liability of the United States and entitle the claimant to institute an action. *Japanese War Notes Claimants Ass'n v. United States,* 178 Ct. Cl. 630, 373 F.2d 356, *cert. denied,* 389 U.S. 971 (1967). As this court pointed out in *Japanese War Notes,* there are certain instances in which the running of the statute will be suspended when an accrual date has been ascertained, but plaintiff is unaware of his potential cause of action. Plaintiff's ignorance of a claim of which he should be aware, however, is not enough to toll the statute. *Id.* at 634, *citing, inter alia, Navajo Freight Lines, Inc. v. United States,* 176 Ct. Cl. 1265 (1966); *Thomas v. United States,* 125 Ct. Cl. 76 (1953). In order to show that its ignorance of the facts is excusable, plaintiff must show either that defendant has concealed its acts with the result that plaintiff was unaware of the existence of a cause of action or that the nature of plaintiff's injury was such that it was inherently unknowable at the time the cause of action accrued. *Japanese War Notes, supra,* at 634, 373 F.2d at 635; *Spevack v. United States,* 182 Ct. Cl. 884, 390 F.2d 977 (1968).

Plaintiff has made no argument that the United States attempted to conceal its construction of the canal. Such an argument is untenable in the face of the intense public controversy created by Congress' appropriation of funds for the peoject, and the detailed coverage of the construction of the Canal in both the state and national press. More importantly, plaintiff does not contend that its injury was inherently unknowable. The injury to one's mineral rights caused by construction of a Canal over the land in which these rights are leased is obviously

knowable.[2] The objective criteria—concealment and inherent knowableness of the facts—determine the commencement of running of the statute; whether plaintiff knew, or by due diligence should have known, of its injury is not an issue in these circumstances.

Plaintiff alleges, however, that it was simply ignorant of the injury to its mineral rights until 1974, although it admits in its response to defendant's motion that it was aware that the Canal was being constructed. Where the actions of the government are open and notorious, we have pointed out that plaintiff is on inquiry as to its possible injury. *Kabua Kabua v. United States,* 212 Ct. Cl. 160, 164-65, 546 F.2d 381, 383 (1976), *cert. denied,* 434 U.S. 821 (1977).

Once plaintiff is on inquiry that it has a potential claim, the statute of limitations begins to run. *Japanese War Notes,* 178 Ct. Cl. at 634, 373 F.2d at 359. *Accord, Braude v. United States,* 218 Ct. Cl. 270, 585 F.2d 1049 (1978). In the present case, plaintiff was a Florida corporation, with an office staffed by a high-ranking corporate officer in Tallahassee, Florida. The defendant has supplied numerous articles from state and national news media to show that the building of the Canal was indeed open and notorious. Plaintiff itself has admitted that it was aware of the construction of the Canal. These circumstances make it amply clear that plaintiff was on inquiry as to the threat to its property rights.

Plaintiff has produced in its response to defendant's motion no evidence of any circumstances that might

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[2] The court gave as an example of an inherently unknowable injury, when defendant delivers the wrong type of fruit tree to plaintiff and the wrong cannot be determined until the tree bears fruit. *Japanese War Notes Claimants Ass'n v. United States,* 178 Ct. Cl. at 634, 373 F.2d at 359.

explain its assertion that it was ignorant of its alleged injury until "July or August of 1974."[3] Therefore, and because of the foregoing facts, we conclude that defendant has met its burden of showing that the claim presented in this action is time-barred.

All other responsive arguments raised by plaintiff, although not directly addressed by this order, have been considered and found to be without merit.

Accordingly, after consideration of the submissions of the parties, without oral argument of counsel, defendant's motion for summary judgment is granted and plaintiff's petition as to Count II is dismissed.

BY THE COURT

/s/ Robert L. Kunzig
Judge

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[3] Contrary to its contentions, plainitff is required to show that there is some material issue of fact once defendant has met its initial burden of proving that none exists. Rule 101(f) of the rules of this court provides in relevant part:

> When a motion for summary judgment is made and supported as provided by this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, will be entered against him.

APPENDIX D

IN THE
UNITED STATES COURT OF CLAIMS
November 6, 1981

ORDER

PER CURIAM: IT IS ORDERED that the motions of the parties, as set forth, for rehearing, reconsideration or other relief under Rules 7(d), 151(b) and 152 are DENIED:

309-72 COASTAL PETROLEUM COMPANY

Plaintiff's motion, filed Oct. 6, 1981, for rehearing with reference to the order of Sep. 22, 1981.

(NICHOLS, KUNZIG and BENNETT, *Judges*)

214-77 CLYDE R. YAIST

Defendant's motion, filed Sep. 11, 1981, for rehearing *en banc* with reference to the opinion of July 29, 1981.

(The SEVEN ACTIVE JUDGES as to *en banc* rehearing. Judge KASHIWA would grant the motion)

(FRIEDMAN, *Chief Judge*, DAVIS and SMITH, *Judges*, as to rehearing)

282-79C WILLIAM C. FUCIK

Defendant's motion, filed Sep. 17, 1981, to alter or amend with reference to the opinion of July 29, 1981.

(COWEN, *Senior Judge*, KASHIWA and BENNETT, *Judges*)

App. 22-80 JOSEPH T. SERE

Petitioner's motion, filed Oct. 5, 1981, for rehearing for a new trial with reference to the order of Sep. 25, 1981.

(DAVIS, KUNZIG and SMITH, *Judges*)

471-80C JAMES B. COLE

Plaintiff's motion, filed Oct. 16, 1981, for reconsideration with reference to the order of Sep. 25, 1981.

(FRIEDMAN, *Chief Judge*, DAVIS and KUNZIG, *Judges*)

38-81C HIRAM DUNN

Plaintiff's appeal (motion), filed Oct. 1, 1981, for reconsideration with reference to the order of Sep. 22, 1981.

(DAVIS, NICHOLS and KASHIWA, *Judges*)

205-81C CORPORAL CARNIES MCMURRY

Plaintiff's motion, filed Oct. 6, 1981, to reconsider order or, in the alternative, motion for rehearing and plaintiff's motion for summary judgment on rehearing, filed Nov. 2, 1981, as a supplement thereto with reference to the order of Sep. 25, 1981.

(FRIEDMAN, *Chief Judge*, KUNZIG and BENNETT, *Judges*)

Opposition

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FILED
MAR 15 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1468

In the Supreme Court of the United States

OCTOBER TERM, 1981

COASTAL PETROLEUM CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1468

COASTAL PETROLEUM CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner argues (Pet. 8) that the Court of Claims erred in holding that the use by the United States of limestone from the bed of a navigable waterway was not an unconstitutional taking without just compensation of petitioner's property interest in mining that limestone. Petitioner thereby seeks to revive an issue that this Court declined to consider on December 1, 1980, when it denied a petition for a writ of certiorari in this same case presenting the same point. *Coastal Petroleum Co.* v. *United States*, 449 U.S. 1011.

1. Petitioner owns a lease from the State of Florida for minerals on the bed of Lake Okeechobee, which is a navigable waterway of the United States (Pet. App. 1a). During the 1960's the Corp of Engineers built a levee on the lake and used limestone from the lake bed for construction materials (*id.* at 3a).

In 1974, petitioner filed suit in the Court of Claims alleging that this use of the minerals in the lake bed constituted a compensable taking. This claim was denominated "Count I" when petitioner subsequently added a distinct claim (Count II) for use of limestone from sources other than Lake Okeechobee in building a separate canal (Pet. App. 4a).

In 1975, the Court of Claims granted the government's motion for summary judgment on Count I, holding that all submerged property within a navigable body of water is subject to the federal government's navigational servitude and that the levee in this case was built in aid of navigation (Pet. App. 5a-6a). Thus, under settled principles there was no compensable taking. As to Count II, the court remanded for further proceedings. The court, however, granted petitioner's request to extend the time in which to seek rehearing until after a decision on Count II.

After this Court's decision in *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979), petitioner filed for rehearing with the Court of Claims, seeking to have the 1975 order modified. The Court of Claims denied the motion for rehearing (Pet. App. 11a-14a). Petitioner then filed a petition for a writ of certiorari with this Court on the taking issue (No. 80-389) which was denied. 449 U.S. 1011 (1980).

Subsequently, the Court of Claims dismissed Count II of petitioner's complaint as barred by the statute of limitations (Pet. 8). After that order, petitioner filed the present petition for certiorari. Petitioner raises no question involving Count II, and instead simply presents again the identical issues submitted in the earlier petition. For the reasons stated at greater length in our brief in opposition to the prior petition (80-389 Pet. 7), "[n]othing in the *Kaiser Aetna* holding casts doubt on the foregoing principles upon which the Court of Claims relied" in holding that the government's

proper exercise of its navigational servitude supersedes the riparian owner's title to submerged lands. See *United States* v. *Chicago, M., St. P. & P.R.R.*, 312 U.S. 592, 596-597 (1941); *Scranton* v. *Wheeler*, 179 U.S. 141, 163 (1900). Nothing has occurred since the Court's denial of this same basic petition in 1980 to make the issue worthy of review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MARCH 1982

DOJ-1982-03